IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

ADMIRALITY SUIT No 14 of 2003
WITH
MISC.CIVIL APPLICATION No 187 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

M.G. FORESTS PTE LTD.

Versus

"M.V. PROJECT WORKSHIP"

Appearance:

1. ADMIRALITY SUIT No. 14 of 2003

MR MJ THAKORE WITH MR RS SANJANWALA for Petitioner No. 1

MR T POORNAM WITH MR RJ OZA for Respondent No. 1

..... for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision:24/02/2004

CAV.JUDGEMENT

1 The plaintiff in the suit is a Private Limited Company incorporated and registered under the laws of Singapore and its registered office is in Singapore at the address stated in the cause title. It is averred in the plaint that the plaintiff Company was promoted by Mr.Mukesh Gupta and Mrs.Gupta who are also the Directors of the plaintiff Company. It is further averred that the said promoters and Directors are also promoters and Directors of Gupta Global Exim Private Limited, a company incorporated and registered in India and having its office and works in Gandhidham (Gujarat). It is further stated in the plaint that the promoters and Directors of the plaintiff Company are persons ordinarily residing in Gujarat and having their business in Gujarat.

2 Defendant No.1 is the vessel named "M.V.Project Workship"(hereinafter referred to as 'the vessel'). It is a foreign sea going vessel registered in Willenstad, Netherlands and flying a Dutch Flag. The registered owners are M/s.Sakhalin Heavy Transport Group. Though it is stated in the plaint that the registered owners are having place of business at the address mentioned in the cause title, in fact, no such address is mentioned in the cause title.

3 Defendant No.2 is a Company incorporated and registered under the laws of Hong Kong and having its registered office at the address mentioned in the cause title i.e. in Hong Kong. It is stated that defendant no.2 is engaged in the business of financing transactions and one such transaction is entered into by the plaintiff for purchase of the goods in question.

4 The case of the plaintiff is that it entered into a charter party agreement with owners of defendant no.1 for transportation of goods by sea from Guyana to Tuticorin in India. For this purpose, a fixture note dated 26/8/2003 was executed on or around 8/9-9-2003. That defendant no.1 Vessel arrived at Georgetown Guyana in or around 2nd week of September 2003 and the shippers loaded 5825.8406 CBM hardwood wooden logs. That accordingly a bill of lading was issued dated 23/9/2003 denoting shipper as one Barama Company Limited. The column containing the name of the consignee does not bear any name but states 'to order' while the column of notify address states name of defendant no.2. The vessel sailed on 25/9/2003 from Georgetown Guyana.

5 It is averred that on the basis of the aforesaid date of sailing the expected time of arrival of the vessel was last week of October 2003, but in fact the

vessel arrived at the port of destination i.e. Tuticorin in India, only on 16.12.2003. Thus, according to the plaintiff the delay in delivering the cargo at the port of destination resulted in the inability of the plaintiff to deliver the cargo to one Shri Ambica Timber Depot, Chennai, with whom the plaintiff had entered into an agreement on 20/9/2003. According to the plaintiff, before the vessel was chartered the plaintiff was given to understand that the speed of the vessel would be around 9 to 10 knots and hence, the plaintiff had entered into an agreement for sale of the cargo in light of the expected time of arrival after 35 days of voyage from the date of sailing from Guyana. That due to delay in arrival of the vessel at the port of destination Shri Ambica Timber Depot had expressed its inability to take the delivery of the cargo at the rates agreed upon between the parties. This according to the plaintiff resulted in a situation where the plaintiff was likely to incur loss in the entire transaction. It is stated in paragraph 5.5 of the plaint that the resultant loss to the plaintiff and/or the defendant no.2 is USD 233,033.62 which is solely attributable to delayed delivery of cargo by the defendant No.1 vessel.

6 The plaintiff, therefore, has preferred this suit and in paragraph 15A the following prayer is made :

"15. The plaintiff therefore prays :-

(A) That the defendant vessel M.V."M.V.Project Workships" along with hull, tackle, engines, machinery, boats, apparel and other paraphernalia at present lying in port of harbour Tuticorin be ordered to be arrested with a view to secure the plaintiff's claim in arbitration proceedings to be instituted in London subject to English Laws".

7 The plaint was presented on 19/12/2003 and this Court made an order of arrest of the vessel on the same day.

8 The defendant no.1 vessel has put in its appearance and contested the claim of the plaintiff by preferring Misc. Civil Application No. 187 of 2003. In the said application, the following prayers are made :

"In the premises aforesaid, the Applicant most respectfully prays that this Hon'ble Court may

be pleased to :

a) dismiss Admirality Suit No.14 of 2003;
b) without prejudice to the above and in the alternative that the plaint be rejected; and
c) without prejudice to the above to set aside, vacate the order of arrest passed on 19.12.2003 and to release the vessel m.v.PROJECT WORKSHIPS".

9. Mr.T.Poornam, appearing along with Mr.Rasesh Oza on behalf of the Vessel has raised the following contentions :

(a) That this Court has no jurisdiction to entertain this Admiralty Suit,

(b) That the plaintiff has no right, title or interest over the goods received from Guyana, as the plaintiff is neither a consignee nor endorsee; and hence, the plaintiff has no right to bring this suit,

(c) The right of the plaintiff is limited to being charterer of the vessel,

(d) That the basis of the suit is non existent. That there is no condition in the contract either as to speed of the vessel or as to the period of the voyage.

(e) That even otherwise there is no ground for making any claim against the vessel : as no stipulation of time is shown to exist either in the contract of purchase (entered into with Barama Company Limited) or in the contract of sale (stated to have been entered into with Shri Ambica Timber Depot, Chennai): thus, the perceived loss is merely notional.

It was, therefore, urged that the suit be dismissed and the order of arrest be vacated.

9.1 On the aspect of jurisdiction it was urged that the vessel was not within territorial jurisdiction of this Court and hence, this Court could not have exercised the Admiralty jurisdiction for ordering the arrest of the vessel. Alternatively, it was submitted that as the facts on record show, neither the whole nor in part,

cause of action can be said to arise within the local limits of this Court. That the case of the plaintiff was that the plaintiff should be protected by ordering arrest of the vessel so as to secure the plaintiff's claim in arbitration proceedings which were yet to be instituted in London. That the entire basis was highly presumptuous in as much as the plaintiff had not brought any fact on record to show that in fact it had incurred any loss. Alternatively, it was urged that by virtue of Section 9 of the Arbitration and Conciliation Act 1996, this Court would not have any jurisdiction.

9.2 Inviting attention to various averments in the plaint, correspondence placed on record, and terms of the fixture note it was submitted that as on the date of the plaint the bill of lading was admittedly not in favour of the plaintiff; that the bill of lading does not even bear an endorsement in favour of the plaintiff. In fact, as can be seen from the bill of lading it was in favour of defendant no.2 and if any one had a prima facie right on the basis of bill of lading available on record, it was only defendant no.2. That in such circumstances, the plaintiff had no right, title or interest over the cargo and as a consequence the plaintiff could not even claim a right to sue as owner of the goods, on the basis of perceived loss from the transaction of purchase and sale. The right of the plaintiff was limited and was co-extensive to the right a charterer might have.

9.3 Alternatively, it was further contended that taking into consideration the fixture note dated 26/8/2003 it was apparent that there was no stipulation in the fixture note as regards either the speed of the vessel or the time of voyage. It was submitted that this aspect had to be appreciated in the context of the fact that the fixture note, in the column of vessel particulars, stated various details, including technical details about the vessel, but nowhere was any mention made as regards the speed at which the vessel was likely to travel. That on reading the entire fixture note it could not be stated that there was any representation as regards speed, or that there was any clause pointing out the speed of the vessel,and there was no clause giving any guarantee/warrantee as to the period during which the vessel would complete the voyage. It was also submitted that the fixture note did not contain any clause as regards penalty for delay. In fact, after clause 41 of the fixture note it was specifically stated that this fixture is subject to all other terms, conditions exceptions as per "CENCON" Charter (As Revised 1922, 1976 and 1994). After referring to the aforesaid condition

regarding applicability of "CENCON" Charter attention was invited to paragraph 6(i) of the application filed by the vessel wherein the Owners' Responsibility Clause has been reproduced, as under :

'Owners' Responsibility Clause.

The Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss, damage or delay has been caused by personal want of due diligence on the part of the Owners or their Manager to make the Vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied or by the personal act or default of the Owners or their Manager.

And the Owners are not responsible for loss, damage or delay arising from any other cause whatsoever, even from the neglect or default of the Master or crew or some other person employed by the Owners on board or ashore for whose acts they would, but for this Clause, be responsible, or from unseaworthiness of the Vessel on loading or commencement of the voyage or at any time whatsoever".

9.4 It was therefore submitted that it was not even the case of the plaintiff that delay, if any, had been occasioned due to personal want of due diligence on the part of the Owners or their Manager to make the vessel in all respects seaworthy, nor was it a case where vessel was not properly manned, equipped or supplied, nor was it the personal act or default of the Owners or the Manager. That in fact, the delay, if any, had been occasioned due to the circumstances beyond the control of the owners of the vessel. That even the plaintiff did not dispute the fact that the vessel developed mechanical problem during voyage resulting in the vessel having to undertake repairs enroute.

9.5 It was, therefore, urged that in the circumstances as the plaintiff had not only failed to make out a prima facie case in its favour and against the defendant, but also failed to make out any case i.e. in other words it was a hopeless case requiring dismissal of the suit in limine.

10. Mr.M.J.Thakore, learned Senior Advocate appearing with Shri R.S.Sanjanwala on behalf of the plaintiff submitted that the law was well settled that High Court

being a superior Court, was vested with jurisdiction unless it was expressly shown that it did not have jurisdiction. It was submitted that the provisions of the Merchant Shipping Act, 1958 did not apply and considering the provisions of the Colonial Courts of Admiralty Act, 1890 read with provisions of the Colonial Courts of Admiralty (India) Act, 1891 it was clear that the Court was required to exercise jurisdiction in relation to territorial waters as defined in (The) Territorial Waters, Continental, Shelf Exclusive Economic Zone and Other Maritime Zones Act, 1976. Inviting attention to Section 120 of the Code of Civil Procedure, 1908 (for short 'the Code'), it was submitted that the High Court in exercise of its original civil jurisdiction was not bound by provisions of Sections 16, 17 & 20 of the Code, viz. the sections which dealt with the normal concept of territorial jurisdiction of Civil Court. Therefore, it was urged that while instituting the Admiralty Suit it was not necessary to show as to where the subject matter of the suit was situate and the requirement of the residence of the defendant or the requirement of cause of action, wholly or in part, arising within the local limits of a Court was also not required to be established. Thus, it was submitted that the jurisdiction of the High Court was not to be confined to applying the usual tests for determination of jurisdiction, and considering the settled legal position it was apparent that the grounds on which the defendant was contesting the jurisdiction of this Court could not be the grounds for divesting this Court of its admiralty jurisdiction which extended over entire territorial waters of the Union of India.

10.1 It was also submitted that the Provisions of Section 9 of the Arbitration and Conciliation Act, were not applicable in admiralty jurisdiction considering the definition of 'Court' given in Section 2(c) of the said Act. That even otherwise at the time of filing of the suit action was in rem and not in personam. That arbitration proceedings having not yet commenced, alternatively, this Court can validly exercise jurisdiction to entertain application under Section 9 of the Arbitration Act and grant interim relief till the Reference was made on an application under Section 8 of the Arbitration Act.

10.2 In relation to the contention as regards right to sue it was submitted that the transaction had to be examined under provisions of Sale of Goods Act. That defendant no.2 did not dispute that the said defendant was only a financier of the transaction in question and

hence, defendant no.2 having opened a letter of credit favouring Barama Company Limited, the bill of lading was drawn in favour of defendant no.2; such bill of lading was a negotiable instrument whereunder title to the goods would pass by endorsement. It was further urged that the entire transaction had to be viewed in the overall context viz. the plaintiff negotiating the purchase of goods, entering into contract of purchase with Barama Company Limited, negotiating with defendant no.2 to obtain a letter of credit favouring the seller in relation to the purchase to be made by the plaintiff, the plaintiff thereafter negotiating sale of the goods, and ultimately after realising the sale price from the ultimate purchaser passing on the sale consideration to defendant no.2 for financing transaction after retaining the profit/loss earned/incurred by the plaintiff. It was therefore contended that the bill of lading could not be read in isolation.

10.3 It was submitted that the delivery of cargo at the port of destination was severely delayed due to Engine breakdown and this fact was not disputed by defendant no.1. In support of this proposition reliance was placed on paragraph 5.6 of the plaint wherein extract of communication addressed on behalf of the owners to the agent of the plaintiff has been reproduced.

10.4. It was further contended that the law of charter parties made it clear that there was an implied warranty in law and for this purpose attention was invited to various articles from the book "SCRUTTON ON CHARTER PARTIES" (20th Edition). That, therefore, even if the fixture note did not contain any stipulation as to guarantee/warranty regarding period of voyage, in normal course of events the law presumed such a warranty that cargo would be delivered within a reasonable time from the date the ship sails.

11. Mr.Poornam in rejoinder submitted that the plaintiff was aware that the vessel was already under arrest by two orders made by High Court of Tamilnadu on 17/12/2003. That as these orders were prior in point of time the plaintiff could have filed a Caveat in the High Court at Chennai to ensure that the order of arrest was not vacated without hearing the plaintiff. That in such circumstances, the plaintiff has not made out any case for bringing the suit before this Court.

12 Both the sides have made elaborate submissions in relation to the admiralty jurisdiction of this Court and for this purpose placed reliance upon number of

decisions. However, both the sides have heavily relied upon the decision of the Apex Court in case of M.V.Elisabeth and others Vs. Harwan Investment and Trading Pvt.Ltd., 1993 Supp.(2) SCC 433. On behalf of the plaintiff reliance has also been placed on Division Bench decision dated 20/7/2001 rendered by Mumbai High Court in case of Mr.Kamlakar Dube Vs. M.V.Umang, Appeal No.59 of 2000 in Notice of Motion No. 1153 of 1998 in Admiralty Suit No.33 of 1997. On the other hand, on behalf of the vessel a decision of Division Bench of Madras High Court rendered on 26/10/1995 in case of M/s. Seawaves Shipping Services Vs. M/s.Adriatic Tankers Shipping Co. in O.S.A.No.251/95 (1996-1-L.W.182) has been relied upon. The Mumbai High Court decision has dissented from the view expressed by Madras High Court and hence, it will become necessary to deal with the issue of admiralty jurisdiction of this Court.

13. On behalf of the plaintiff it was contended that in light of the fact that this Court has come into existence under the Bombay State Reorganization Act, 1960, the jurisdiction and the powers which were exercised and enjoyed by the Bombay High Court prior to 1/5/1960 shall be available to this Court and hence, the decision of the Bombay High Court in relation to exercise of admiralty jurisdiction should be preferred to any contrary view expressed by any other High Court. In this connection, clause 32 of the Letters Patent was also referred to trace the history or jurisdiction in admiralty matters which were exercised by the Bombay High Court.

14. Section 120 of the Code stipulates that Sections 16, 17 & 20 of the Code will not apply to the High Court in exercise of its original civil jurisdiction. Section 16 of the Code stipulates that subject to the pecuniary or other limits prescribed by any law, suits in relation to different matters are to be instituted where subject matter is situate. Clause (f) pertaining to recovery of immoveable property actually under distraint or attachment requires that a suit be instituted in the Court within local limits of whose jurisdiction the property is situate. The Explanation lays down that "property" in Section 16 of the Code means property situate in India. Section 17 of the Code pertains to institution of suits for immovable property situate within jurisdiction of different Courts. This section requires that the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate.

15. Section 20 of the Code pertains to other suits to be instituted where the defendants reside or cause of action arises. Clause (a) lays down that a suit shall be instituted in a Court within the local limits of whose jurisdiction the defendant resides or carries on business; Clause (b) pertains to a situation where there are more than one defendants, and institution of suit may be against any of the defendants; Clause (c) pertains to the cause of action, viz. where cause of action, wholly or in part, arises within the local limits of jurisdiction of a Court.

16. Therefore, on a plain reading of provisions of Section 120 with Sections 16, 17 & 20 of the Code it can be said that in the situation stipulated in these sections the High Court in original civil jurisdiction is not required to determine its civil jurisdiction on the basis of provisions of the aforesaid three Sections.

17. Article 226 of the Constitution of India which grants powers to High Court to issue certain writs stipulates that every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction for the enforcement of any rights conferred by part III of the Constitution and for any other purpose. Under Article 226(2) of the Constitution, the power conferred by Clause (1) is also available to a High Court in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories. Thus, it can be seen that even while exercising extraordinary powers available under the Constitution the jurisdiction of the High Court is primarily circumscribed by its territorial limits viz. the jurisdiction has to be in context of the territorial jurisdiction available to the High Court. In this context it will be useful to refer to the decision of the Apex Court in case of Union of India and others Vs. Adani Exports Ltd. and Another, 2002(1) SCC 567.

> "16. It is clear from the above constitutional provision that a High Court can exercise the jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises. This provision in the Constitution has come up for consideration in a number of cases before this Court. In this regard, it would suffice for us to refer to the observations of this Court in the case of Oil and Natural Gas Commission Vs. Utpal Kumar Basu (SCC at

P.713)wherein it was held :

'Under Article 226 a High Court can exercise the power to issue directions, orders or writs for the enforcement of any of the fundamental rights conferred by Part III of the Constitution or for any other purpose if the cause of action, wholly or in part, had arisen within the territories in relation to which it exercises jurisdiction, notwithstanding that the seat of the Government or authority or the residence of the person against whom the direction, order or writ is issued is not within the said territories. The expression 'cause of action' means that bundle of facts which the petitioner must prove, if traversed, to entitle him to a judgment in his favour by the Court. Therefore, in determining the objection of lack of territorial jurisdiction the court must take all the facts pleaded in support of the cause of action into consideration albeit without embarking upon an enquiry as to the correctness or otherwise of the said facts. Thus the question of territorial jurisdiction must be decided on the facts pleaded in the petition, the truth or otherwise of the averments made in the petition being immaterial'.

It is seen from the above that in order to confer jurisdiction on a High Court to entertain a writ petition or a special civil application as in this case, the High Court must be satisfied from the entire facts pleaded in support of the cause of action that those facts do constitute a cause so as to empower the court to decide a dispute which has, at least in part, arisen within its jurisdiction. It is clear from the above judgment that each and every fact pleaded by the respondents in their application does not ipso facto lead to the conclusion that those facts give rise to a cause of action within the court's territorial jurisdiction unless those facts pleaded are such which have a nexus or relevance with the lis that is involved in the case. Facts which have no bearing with the lis or the dispute involved in the case, do not give rise to a cause of action so as to confer

territorial jurisdiction on the court concerned. If we apply this principle then we see that none of the facts pleaded in para 16 of the petition, in our opinion, falls into the category of bundle of facts which would constitute a cause of action giving rise to a dispute which could confer territorial jurisdiction on the courts at Ahmedabad ".

18 Therefore, even while exercising powers and jurisdiction under Article 226 of the Constitution, the High Court is required to be satisfied on the basis of entire facts pleaded in support of cause of action that such facts constitute a cause empowering the Court to decide a dispute which has, atleast in part, arisen within its jurisdiction. The expression 'cause of action' means that bundle of facts which a plaintiff/petitioner is required to prove so as to entitle him to judgment in his favour by the Court when such facts are disputed.

19 The aforesaid principles are the basic principles relating to territorial jurisdiction of a Court of original civil jurisdiction or a High Court exercising its extraordinary powers under the Constitution. The plaintiff in the present case contends that these principles cannot be taken into consideration when the High Court is called upon to decide whether the High Court is vested with such admiralty jurisdiction. For examining this proposition it becomes necessary to consider provisions of (The) Merchant Shipping Act 1958, as well as Provisions of (The) Territorial Waters, Continental Shelf, Exclusive Economic Zone And Other Maritime Zones Act,1976 and also the provisions of the Territorial Waters Jurisdiction Act, 1878.

20 The decision in the case of M.V.Elisabeth & Others (supra) has to be appreciated bearing in mind the principles enunciated by the Supreme Court.In the case of CIT vs. Sun Engineering Works Pvt.Ltd. [1992] 198 ITR 297, the Apex Court has cautioned against reading its own judgment in a truncated manner in these words :

"It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which

were before this Court. A decision of this court takes its colour from the questions involved in the case in which it is rendered and, while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. In Madhav Rao Jivaji Rao Scindia Bahadur Vs. Union of India [1971] 3 SCR 9; AIR 1971 SC) :

It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment".

21 In a subsequent decision the Apex Court itself in the case of M.V.AL. Quamar Vs. Tsavliris Salvage (International) Ltd. AIR 2000 SC 2826, after referring to the decision in case of M.V.Elisabeth (supra) observed as under :

"That was a case in which the res in question was found within the territorial waters of Visakhapatnam,Port. Neither the plaintiff nor the defendant had any nexus with the territorial limits of the Andhra Pradesh. The cause of action has also had not arisen within Andhra Pradesh still because of the presence of res in territorial waters of the Andhra Pradesh, it was held by this Court that the Andhra Pradesh High Court as Admiralty Court had perfect jurisdiction to arrest the ship being used as Defendant No.1 before judgment. In the light of the aforesaid settled legal position therefore, it must be held that once the vessel, M.V.Al Tabish came within the territorial waters of the Andhra Pradesh, the Andhra Pradesh High Court, as Admiralty Court, had complete jurisdiction to even initially entertain the suit against not only the ship but against its owner, that is alleged to have committed breach of salvage contract qua that ship. If such a suit was maintainable in the inception before the Andhra Pradesh High Court in its admiralty jurisdiction, then at the executing stage when Section 44A was invoked for executing a similar decree passed by competent superior

Court in England in exercise of admiralty jurisdiction, such a decree could validly be executed by invoking the aid of corresponding Admiralty Court being the Andhra Pradesh High Court when the res was already within its jurisdiction. Consequently, even reading Section 39(3) with Section 44A, there is no escape from the conclusion that the time when execution petition was moved before the Andhra Pradesh High Court by even treating it as a transferee Court it can be said to be perfectly competent to entertain such a suit even in its inception against the ship as well as its alleged owner and to resolve the dispute between respondent No.1 and respondent No.2. It has to be kept in view that if the ship in question which is arrested at Visakhapatnam had sailed out of the territorial waters of Andhra Pradesh then the Andhra Pradesh High Court would have lost its jurisdiction to entertain such a suit or the execution proceedings for executing the decree of foreign Court. But once it was within its territorial waters the ship could have been validly subjected to such a suit not only against itself but against its owner."(emphasis supplied).

xxx xxx xxx xxx

"23.The other introductory aspect pertains to the conferment of admiralty jurisdiction on to the Andhra Pradesh High Court. In terms of provisions of Andhra State Act of 1953 (Act 30 of 1953) certain territories from erstwhile State of Madras were included in the State of Andhra Pradesh and the Court at Andhra Pradesh was re-designated as the High Court of Andhra Pradesh when the State was so named under the State Reorganisation Act,1956. The Andhra Pradesh High Court 'being the successor' of the High Court of Madras (presently Tamilnadu) has thus the similar jurisdiction as was so vested in the Madras High Court prior to the transfer. Needless to say that since Visakhapatnam is also included in the State of Andhra Pradesh, the port of Visakhapatnam falls within the admiralty jurisdiction of the High Court of Andhra Pradesh. It is in this context observations of this Court in M.V.Elisabeth V. Harwan Investment and Trading Pvt. Ltd.,Goa, AIR 1993 SC 1014 : (1993 AIR SCW 177), seem to be of some assistance. This Court in paragraph 26 of the report observed

:

'Assuming that the admiralty powers of the High Courts in India are limited to what had been derived from the Colonial Courts of Admiralty Act,1890, that Act, having equated certain Indian High Courts to the High Court of England in regard to admiralty jurisdiction, must be considered to have conferred on the former all such powers which the latter enjoyed in 1890 and thereafter during the period proceeding the Indian Independence Act,1947. What the Act of 1890 did was, as stated earlier, not to incorporate any English statute into Indian law, but to equate the admiralty jurisdiction of the Indian High Courts over places, persons, matters and things to that of the English High Court. As the admiralty jurisdiction of the English High Courts expanded with the progress of legislation, and with the repeal of the earlier statutes, including in substance the Admiralty Court Acts of 1840 and 1861, it would have been reasonable and rational to attribute to the Indian High Courts corresponding growth and expansion of admiralty jurisdiction during the pre-independence era. But a restrictive view was taken on the question in the decision of the High Courts cited above'.

24. There is thus no scope to conclude that the admiralty jurisdiction of the Andhra Pradesh High Court stands 'frozen' or 'atrophied' in any way whatsoever". (emphasis supplied).

22 Hence, it is apparent that the decision of the Apex Court in case of M.V.Elisabeth (supra) was only in the context of the controversy before that Court viz. as to whether High Court of Andhra Pradesh could exercise jurisdiction in a case involving outward cargo. The entire controversy pertained only to this dispute. There was no dispute that the vessel in question was located within the territorial waters of Visakhapatnam port and hence within territorial jurisdiction of the High Court of Andhra Pradesh. In any case, if there was any doubt as to this aspect of the matter, the aforesaid subsequent decision of the Supreme Court in the case of M.V.AL.Quamar (supra) lays the controversy at rest. In the subsequent decision it has categorically been observed (as extracted hereinbefore) that the High Court

of Andhra Pradesh was empowered to exercise jurisdiction in light of the fact that the vessel was within territorial waters of Visakhapatnam port, and despite the fact that neither the plaintiff nor the defendant had any nexus with the territorial limits of Andhra Pradesh nor had the cause of action arisen within Andhra Pradesh, yet because of the presence of res in territorial waters of Andhra Pradesh it was held by the Apex Court that the High Court of Andhra Pradesh as Admiralty Court had perfect jurisdiction to arrest the ship. The subsequent decision of M.V.AL.Quamar (supra) also takes care of the contention raised on behalf of the plaintiff that this Court being the successor of the High Court of Bombay (presently Mumbai) has similar jurisdiction as was so vested in the High Court of Bombay prior to The Bombay State Reorganization Act,1960. The observation that the admiralty jurisdiction is neither 'frozen' nor 'atrophied' in any manner whatsoever has to be read in the context of the contention that the admiralty powers of High Court in India were limited to the powers derived from the Colonial Courts of Admiralty Act,1890 and it was this contention which was negatived by the Apex Court in the case of M.V.Elisabeth (supra). To read anything more as the plaintiff would like to do, is not warranted as can be seen from the subsequent decision of the Supreme Court in the case of M.V.AL.Quamar.

23 There are two contrary decisions rendered by Division Benches of Bombay High Court and Madras High Court. Both the decisions apparently place reliance on the decision of the Supreme Court in the case of M.V.Elisabeth (supra). As already seen hereinbefore the said decision in case of M.V.Elisabeth has to be read in the context in which it was rendered and as already read and understood subsequently in another decision of the same Court in the case of M.V.AL.Quamar (supra). The Mumbai High Court has expressed a dissenting opinion from the view taken by the Madras High Court. However, for the reasons given herein, the view expressed by Madras High Court is more commendable and requires to be accepted and adopted. In paragraph 17 of the decision Madras High Court has stated thus :

> "17. It will be seen from the above passages that the Supreme Court has used the expression 'concerned High Court' in more than one place.. That shows that the Supreme Court proceeded on the principle that each High Court exercises jurisdiction exclusively over a particular territory. In that case, the vessel was within the territorial jurisdiction of Andhra Pradesh

High Court and, therefore, the question which is now before us did not arise. The plaintiff in that case was an Indian Company and part of the cause of action arose in this country. In the present case, the plaintiff is a foreign company and no part of the cause of action is stated to have arisen here except the entry of the vessel into the Port at Kandla."

24 In connection with the contention based on Section 87 of the Bombay State Reorganization Act, 1960 Mr.Thakor placed reliance on the decision of this Court in the case of The Anand Municipality vs. The Union of India and others, 1960(1) GLR 82. It was submitted that the Full Bench of this Court has laid down that the decision of the High Court of Bombay given prior to the appointed day viz. 1/5/1960 are binding on the High Court of Gujarat. There could be no dispute with the aforesaid legal proposition. However, the Full Bench while deciding the case was called upon to deal with two contentions raised before it. The first contention was on the basis of provision of Section 87 of the Reorganization Act, 1960. The second contention was to the effect that this Court is a Court of Coordinate jurisdiction with the High Court of Bombay and this contention was based on Full Bench decision of Andhra Pradesh High Court. The Full Bench of this Court did not accept this contention and specifically disagreed with the view expressed by the Full Bench of the High Court of Andhra Pradesh. It was held that " Co-ordinate jurisdiction in the ordinary conntation of that expression is that which is exercised by different courts of equal rank and status over the same subject matter and within the same territory and ordinarily at the same time Each Court must have jurisdiction to deal with same subject matter. We do not intend to suggest that for all purposes co-ordinate jurisdiction is to be equated with concurrent jurisdiction or simultaneous jurisdiction but we are unable to see our way to the conclusion that simply because this court is in a sense a successor to the High Court of Bombay in respect of the territories which now form part of the State of Gujarat, it is a Court of co-ordinate jurisdiction with that predecessor".

25 Thus, it is apparent that the Full Bench of this Court has not accepted the proposition that this Court is a Court of co-ordinate jurisdiction in the sense that it is a jurisdiction exercised by different Courts of equal rank and status over the same subject matter and within the same territory and ordinarily at the same time. In

sum and substance, the submission that the admiralty jurisdiction as was available to the erstwhile High Court of Bombay can be exercised concurrently and simultaneously by this Court in relation to the same vessel or ship is not supported by the aforesaid decision of the Full Bench of this Court, but in fact runs counter to the finding recorded by the Full Bench of this Court.

26 The matter may be examined from a slightly different angle. Section 4 of the Indian Penal Code pertains to Extension of Code to Extra-territorial Offences. The Section lays down that the provisions of the Penal Code apply also to any offence committed by (1) any citizen of India in any place without and beyond India; (2) any person on any ship or aircraft registered in India, wherever such ship or aircraft may be. An offence is defined by Explanation to include every act committed outside India which, if committed in India, would be punishable under the Indian Penal Code. Thus, extra territorial jurisdiction of Indian Courts pertains to offences committed outside India on land, high seas or aircraft. For the present, it is not necessary to deal with the situation in relation to offences on land. The jurisdiction to try offences committed on the high seas known as the admiralty jurisdiction is founded on the principle that a ship on the high seas is a floating island belonging to the nation whose flag she is flying. Such jurisdiction extends over offences committed on Indian ships on high seas as well as offences committed on foreign ships in Indian territorial waters. What is material to note is that it makes no difference whether the offender himself is voluntarily on board the Indian ship or is brought and detained against his will. It is also not material whether the offender comes voluntarily within the jurisdiction of the particular Court by which he is tried or is brought within that jurisdiction against his will. Offences on high seas were not initially triable by ordinary criminal Courts and were only tried by the Admiralty Court. However, by virtue of the Admiralty Offences Act, 1849, and the Merchant Shipping Act, 1894, such offences are triable in England as well as in India by ordinary criminal Courts, as if such offences were committed within the local jurisdiction of those Courts.

27 In this connection, it is necessary to simultaneously consider provisions of Section 188 of the Code of Criminal Procedure. The said Section pertains to Offence Committed Outside India and falls within Chapter XIII which deals with JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS. Section 188 of Cr.P.C.

stipulates that when an offence is committed outside India - (a) by a citizen of India, whether on the high seas or elsewhere; or (b) by a person, not being such citizen, on any ship or aircraft registered in India, such person be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found. The word 'found' does not mean where such person is discovered but where he is actually present. A man brought to a place against his will can be said to be found there. When a man is in the country and is charged before a Magistrate with an offence under the Indian Penal Code, it is not open to him to state that he was brought there illegally from a foreign country. This principle has been laid down by the Bombay High Court in the case of Vinayak D.Savarkar, (1910) 13 Bombay Law Reporter 296. The acts of a foreigner committed beyond the territory of India do not constitute an offence against the Indian Penal Code and hence he cannot be tried by Courts in India for acts committed beyond the territorial limits. It is only when the person acts within the territory over which the authority of Indian law prevails that a foreigner would be subject to i.e. amenable to the jurisdiction of Courts in India. Thus, when a person is required to be punished, and such person, is not an Indian subject, the question is not "where was the act committed", but " was that person at the time, when the act was done, within territory of India". The moment it is found that he was not within Indian territory, the act cannot be termed as an offence under the Indian Penal Code, the person committing such an act is not liable to be punished as an offender, and hence, he is not subject to jurisdiction of criminal Courts.

28 Hence, on conjoint reading of provisions of Section 4 of the Indian Penal Code and Section 188 of the Cr.P.C. it becomes clear that even for the purpose of exercise of admiralty jurisdiction in relation to acts which constitute an offence under the Indian Penal Code a person can be tried by a criminal court only if the act is committed within territorial limits of Indian Courts and such person is found within the territorial limits of the criminal courts. The concept of "found" does not bear repetition. Suffice it to state that an offender has to be physically present within the jurisdiction of criminal Court. If this be the position in relation to criminal offences can it be stated that for the purpose of maritime claim the Indian Courts would have jurisdiction which otherwise it would not have in relation to a foreign subject.

29 In relation to Piracy this is what Privy Council (P.C.) has laid down in the case of In re. The Piracy Jure Gentium, A.I.R.1934 P.C.220 :

> "With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes and the trial and punishment of the criminals are left to the Municipal law of each country. But whereas according to international law the criminal jurisdiction of Municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own national wherever committed, it is also recognised as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but hostis humani generis and as such he is justiciable by any State any where Grotius (1583-1645) 'De Jure Belli at Pacis', Vol.2, Cap 20 $ 40".

Hence, acceptance of the plaintiff's contention would equate a foreign ship with a pirate. As against that, it would be proper if the exercise of jurisdiction - by a civil/admiralty court - is in consonance with, is restricted to its territorial jurisdiction i.e. within local limits of jurisdiction bearing in mind the federal structure under the Constitution. In other words, apply the concept of 'found' for this purpose.

30 The Merchant Shipping Act, 1958, (Shipping Act) is an Act to foster the development and ensure the efficient maintenance of an Indian mercantile marine in a manner best suited to serve the national interests and generally to amend and consolidate the law relating to merchant shipping. Section 2(1) of the Shipping Act lays down that unless otherwise expressly provided, the provisions of this Act would apply to any vessel registered in India, or any vessel which is required by this Act to be so registered; or any other vessel which is owned wholly by person to each of whom any of the descriptions specified in clause (a) or in clause (b) or in clause (c),as the case may be, of Section 21 applies, shall so apply wherever the vessel may be. While sub-section (2) of Section 2 lays down that unless otherwise expressly provided, the provisions of this Act which apply to vessels other than those referred to in sub-section (1) shall so apply only while any such vessel

is within India, including the territorial waters thereof. Section 3 is the Definition Section and sub-section (7) defines "Court" in relation to Sections 178 to 183 (inclusive) to mean a civil or revenue court. Section 3(15) defines "High Court" and reads as under :

"(15) High Court", in relation to a vessel, means the High Court within the limits of whose appellate jurisdiction -

(a) the port of registry of the vessel is situate; or
(b) the vessel is for the time being; or
(c) the cause of action wholly or in part arises;".

Section 3(55) defines "vessel" so as to include any ship, boat, sailing vessel, or other description of vessel used in navigation. Part XVI deals with penalties and procedure. Section 436 prescribes penalties in relation to contravention of any provision of the Shipping Act. Section 437 pertains to Place of Trial and falls under the sub-heading Procedure. The said Section stipulates that any person committing any offence under this Act or any rule or regulation thereunder may be tried for the offence in any place in which he may be found or which the Central Government may by notification in the Official Gazette, direct in this behalf, or in any other place in which he might be tried under any other law for the time being in force. Section 443 of the Shipping Act lays down the power to detain foreign ship that has occasioned damage and reads as under :

"443. Power to detain foreign ship that has occasioned damage.- (1)Whenever any damage has in any part of the world been caused to property belonging to the Government or to any citizen of India or a company by a ship other than an Indian ship and at any time thereafter that ship is found within Indian jurisdiction, the High Court may, upon the application of any person who alleges that the damage was caused by the misconduct or want of skill of the master or any member of the crew of the ship, issue an order directed to any proper officer or other officer named in the order requiring him to detain the ship until such time as the owner, master or consignee thereof has satisfied any claim in respect of the damage or has given security to the satisfaction of the High Court to pay all

costs and damages that may be awarded in any legal proceedings that may be instituted in respect of the damage, and any officer to whom the order is directed shall detain the ship accordingly."

31 Thus, on analysis of the aforesaid provisions it is apparent that the Shipping Act applies to vessels which can be termed, conveniently, Indian Ships under section 2(1), and under Section 2(2) to other vessels, when any such vessel is within India including territorial waters. The definition of High Court in relation to vessel means High Court within the limits of whose appellate jurisdiction either the port of registry of the vessel is situate; or the vessel is for the time being found, or the cause of action wholly or in part arises. For any High Court to be vested with jurisdiction in relation to a vessel it becomes necessary that any one of the three conditions are fulfilled coupled with the fact that such condition is fulfilled within the limits of appellate jurisdiction of such High Court.

32 Section 443 of the Shipping Act requires that any damage is caused in any part of the world to property belonging to either the Government or to any citizen of India or a company by a ship other than an Indian ship and thereafter at any time such ship is found within Indian jurisdiction, the High Court may, upon the application of any person alleging damage, issue an order directing detention of ship until the fulfillment or happening of the events stated in the section. What is therefore necessary is that firstly damage must be caused to the property of Government or citizen of India or company [company herein to mean as defined under the Companies Act,1956] and the ship which is not an Indian ship is found within Indian jurisdiction. Though the phrase used is Indian jurisdiction, it is necessary to bear in mind that the definition of High Court under Section 3(15) specifically stipulates three alternative conditions which are prerequisite in nature and only upon fulfillment of either of those three conditions could the High Court assume jurisdiction.

33 The position therefore that emerges is : Foreign ship has to be found within the limits of appellate jurisdiction of High Court, if the port of registry of the vessel is not situated within the appellate jurisdiction and the cause of action also has not, wholly or in part, arisen within the limits of appellate

jurisdiction; only then the High Court would have jurisdiction to order detention of such foreign vessel, provided it has occasioned damage to property of the Government or a citizen of India or a company. The contention of the plaintiff is that on a plain reading Section 443 of the Shipping Act, does not come into play and hence the definition of "High Court" under Section 3(15) of the Shipping Act cannot be pressed into service for the purpose of deciding the admiralty jurisdiction of the High Court. It is submitted on behalf of the plaintiff that the dispute is between two foreign companies and the damage has been caused to a foreign company and, therefore, for the purpose of exercise of jurisdiction the Court is not fettered by the requirements of the Shipping Act. The jurisdiction of the Court is hence, unlimited as admiralty court and regardless of the fact (1) whether the vessel is within or without the original or appellate jurisdiction of the Court;(2) that cause of action, wholly or in part, has not arisen within such limits, the Court should exercise jurisdiction to arrest the ship and continue such an order as the vessel is found within the territorial waters of the Union of India over which the jurisdiction of the Court extends.

34 The plaintiff is right when it submits that provisions of Section 443 of the Shipping Act are not attracted as no damage has been occasioned either to the property of Government or the citizen of India or company by the vessel. However, the question is, whether it is possible to seek any aid from the provisions of the Shipping Act, for the purpose of determination of the vexed question as regards jurisdiction of this Court in admiralty matters. The plaintiff would like the Court to lay down a proposition that a foreigner or foreign company be placed on pedestal vis-a-vis an Indian ship. As can be seen from the provisions of Section 2(1) of the Shipping Act, any Indian ship becomes amenable to jurisdiction of the High Court provided any one of the three conditions stipulated in Section 3(15) of the said Act stands fulfilled, but for the purpose of exercise of jurisdiction in relation to foreigner or a foreign company or foreign vessel, the High Court is not bound by such prerequisite conditions and can exercise expanded jurisdiction. If for the purpose of vessels flying an Indian flag engaged in Merchant Shipping the provisions of the Shipping Act are applicable, bearing in mind that the jurisdiction of the High Court is defined by Article 226(2) of the Constitution, the High Court cannot act as Court of Coordinate jurisdiction while sitting as admiralty court. The High Court is constituted under the

Constitution and its powers and jurisdiction are, if not circumscribed, atleast amenable to the provisions of the Constitution and to create jurisdiction beyond such power and jurisdiction is not desirable, whatever may have been the position when the Colonial Courts of Admiralty Act of 1890 was brought on statute book. The jurisdiction was unlimited at that point of time due to historical requirements, but as already seen hereinbefore, the Apex Court has no where laid down that the High Courts are empowered to act as Courts of coordinate jurisdiction by assumption of jurisdiction over territorial waters of India in relation to the same subject matter at the same time.

35 The concept of territorial waters, their limit and the jurisdiction thereon has to be understood in the context of the jurisdiction of Union of India for the purpose of revenue and defence. It is in this context that the legislature has framed the Customs Act,1962., The Coast Guard Act,1978, etc. If these provisions are seen they have adopted the same meaning, viz. the same limit, in relation to the Territorial Waters as under (The) Territorial Waters, Continental, Shelf Exclusive Economic Zone and Other Maritime Zones Act, 1976. (Territorial Waters Act). Therefore, the contention that the jurisdiction of the High Court extends over territorial waters of India as a whole has to be appreciated in context of what is stated hereinbefore.

36 The provisions of Territorial Waters Act pertain to matters relating to defining the "limit" in relation to (The) Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones in India and to Sovereignty over, and limits of, territorial waters. Section 3 of the Territorial Waters Act defines the limit of territorial waters as the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline. The provisions of Section 3 read with Sections 6 and 7 make it apparent that territorial waters and the seabed and subsoil underlying, and the air space over such territorial waters form part of the territory of India and that the sovereignty of India extends over such areas. Section 4 of the said Act permits use of territorial waters by foreign ships, so as to grant them right of innocent passage through the territorial waters. Section 13 of the said Act provides for place of trial. It is laid down that any person committing an offence under this Act may be tried for the offence in any place in which he may

be found or in such other place as the Central Government may, by general or speaking order, published in the Official Gazette, direct in this behalf. This provision is akin to Section 437 of the Merchant Shipping Act.

37 Thus, it can be seen that both under the Merchant Shipping Act and the Territorial Waters Act the trial of a person who has committed offence can take place where he may be found. The concept of 'found' has already been taken care of by Provisions of Section 188 of the Code of Criminal Procedure and when the question is of trying an offender for an offence the same consideration would prevail. Therefore, once again, the requirement of physical presence within local limits of the Court would come into play.

38 Therefore, if the overall scheme of Indian Penal Code (Sec.4), Code of Criminal Procedure (Sec.188), The Merchant Shipping Act (Sec.437) and the Territorial Waters Act (Sec.13) are taken into consideration read with Section 2(2) and Section 3(15) of the Merchant Shipping Act, it is apparent that for a Court, including High Court, to be vested with jurisdiction, an offender or offending vessel have to be found within local territorial limits of such Court. Taking a cue from this legal position which emerges on a conjoint reading of various provisions providing for different contingencies, it is apparent that for the purpose of exercise of admiralty jurisdiction in civil dispute the High Court cannot claim unbridled jurisdiction keeping in mind the constitutional provisions.

39 Hence, on the ground of jurisdiction the case of the plaintiff must fail. The defendant vessel is right in contending that this Court has no jurisdiction in law to order arrest of the Vessel.

40 There is one more aspect of the matter. As already recorded hereinbefore it is an admitted position between the parties that the vessel is already under arrest by two orders made by the High Court of Tamilnadu on 17/12/2003. It is also undisputed that these orders were made before the plaintiff presented the suit before this Court. And yet, in the plaint it is averred "The plaintiff is constrained to file this suit at this stage as the defendant vessel is likely to sail away immediately after unloading, which would cause grave and irreparable loss, harm and damage to the plaintiff". The plaintiff's conduct speaks volumes. Hence, even on this count, a vessel which is already under an order of arrest by another High Court cannot be directed to be arrested

once again by this Court in exercise of its admiralty jurisdiction. The position in law is well settled that the suit against the vessel is an action in rem. Once an action in rem is initiated in relation to the same vessel before another High Court and that High Court has exercised jurisdiction, and it is not disputed that the High Court of Tamilnadu had exercised jurisdiction validly, it is not possible to then exercise jurisdiction, even if this Court possesses such jurisdiction, in relation to the same vessel.

41 The suit of the plaintiff therefore is required to be dismissed on the ground of absence of jurisdiction and is dismissed accordingly. However, in light of the fact that both the sides have addressed the Court also on merits of the matter, so as to complete the decision on all the points raised before the Court, it becomes necessary to examine and decide whether the plaintiff has a prima facie case, on the assumption that this Court has jurisdiction to entertain such suit.

42 The case of the plaintiff in nutshell is that on the basis of the correspondence leading to execution of the fixture note the plaintiff was given to understand through the Agents that a representation was made by the owners of the vessel regarding the speed of the vessel on the basis of which the plaintiff estimated duration of the voyage and entered into transaction of sale of the cargo which was shipped on the vessel. That as the delivery of cargo was delayed, the plaintiff is likely to incur a loss, which is yet to be ascertained; and for the purpose of securing such estimated loss, the damage that the plaintiff may be awarded in arbitration proceedings which are yet to be instituted, the defendant vessel should be arrested. It therefore, becomes necessary to appreciate as to whether the plaintiff is right when it contends that the correspondence leading to the fixture note contains a representation by the owners through the Agent ADN Marine Cargo Inc. U.S.A that the vessel would travel at a particular speed.

43 The correspondence is available from page nos. 1 to 8. Page no.9 onwards upto page 20 is the fixture note. At page no.21 is the bill of lading. The correspondence from page no. 22 onwards upto page 33 is in relation to the period after the vessel sailed from port of Georgetown, Guyana. At page nos. 34 & 35 are the papers pertaining to transaction of sale stated to have been entered into between the plaintiff and Sri Ambica Timber Depot. Page Nos. 36 to 38 contain the notice given by the plaintiff and the reply on behalf of

the vessel.

44 For the purpose of appreciating the correspondence which is annexed to the plaint it is necessary to bear in mind that the description of the parties is as follows :

Plaintiff : MG Forest Pte Ltd.
Agent of Plaintiff : ADN Marine Cargo Inc.
: USA (Fourtrans)

Representatives of
Plaintiff : : Mr.Yoshi
: Mr.Nat
: Mr.Mukesh Gupta
: Mr.Soham

Defendant No.1 :M.V.Project Workships
Owner :Sakhalin Heavy
:Transport Group
'Project Workships' C.V.

Agent of Owner : Scan-Trans Chartering
K/S

Defendant No.2 : Lei Shing Hong Trading Ltd.

Representative of D/2 : Mr.Alex Soh

Broker : Euro World Wide
: Shipping

Representative of
Broker : Mr.Frank O Lander.

45 The entire correspondence available at page nos. 1 to 8 is from ADN Marine Cargo Inc., USA, who is admittedly an Agent of the plaintiff as can be seen from the description given hereinbefore. If the correspondence is read, it is apparent that the agent of the plaintiff is trying to first of all present before the plaintiff that it is possible to fix up a charter party contract in relation to the vessel on various terms stated in the correspondence. In relation to the description of the vessel, it is stated "as described by owners except speed 9 to 10 knots only". The submission of the learned Advocate for the plaintiff was that this bracketed portion indicated that the description of the

vessel was as per the owners and that the owners had given out that the speed of the vessel was 9 to 10 knots only. This submission was traversed on behalf of the vessel and it was submitted that the owner of the vessel had at no point of time given out any statement as regards speed of the vessel. That in any case, the correspondence on which reliance was placed in support of the plaint did not emanate from the owners of the vessel and the correspondence between the agent of the plaintiff and the representative of the plaintiff could at best be termed as self serving in nature. The position in law is well settled that, once the averments in plaint are disputed, the plaintiff is bound to prove the same. This can be done only when the suit would go to trial. At this stage, the Court is only required to see whether on the basis of the documents placed on record the plaintiff has made out a prima facie case entitling the plaintiff to relief which would secure the claim of the plaintiff if and when the the plaintiff succeeds in the suit. On a plain reading of the correspondence at page nos. 1 to 8 it is not possible to state that any prima facie case has been made out by the plaintiff entitling the plaintiff to any relief.

46 Particulars to be contained in a plaint are stipulated by Order VII Rule 1 of the Code. According to the plaintiff once these requirements are shown to have been satisfied nothing more is required. Even if this proposition is accepted, the plaint does not establish compliance with Clauses (e), (f), (g) and (i) of Rule 1 of Order VII of the Code. On the one hand it is averred that the plaintiff and/or the defendant No.2 are likely to suffer loss of US $ 2,33,033=62 (Paragraph 5.5); infact, the plaintiff reiterates in paragraph 6 of the plaint that the loss is estimated and is subject to final assessment based on actual sale of cargo after unloading. While on the other hand in paragraph 12 for the purposes of valuation of subject-matter of the suit and court-fees it is averred : "The present suit is not for any monetary claim and by this suit the plaintiff does not seek to recover any amounts from the defendant no.1. Under the circumstances the plaintiff has affixed court fees of Rs.300/-". So, what is the cause of action and when did it arise ? What is the value of the subject-matter of the suit and for purposes of Court-fees?

47 Even otherwise the plaint does not fulfill requirements of Order VII Rule 14 of the Code. The documents on which the plaintiff sues and relies do not accompany the plaint. The purchase contract with

Barama,opening of Letter of Credit by defendant No.2, etc. come on record only in reply to the O.J.M.C.A. These are all documents which, even according to the plaintiff, were in existence on the day the suit was presented. The plaintiff is not relying on sub-rule (2) of Rule 14 of Order VII of the Code. The aforesaid are all factors which, in isolation/singly, may not seem important; but the cumulative effect definitely reflects on the plaintiff's conduct as already seen in the context of the fact of two orders (prior in point of time) of arrest already in existence when the suit was presented.

48 On behalf of the plaintiff attention was invited to various documents annexed with reply affidavit submitted in OJ MCA filed by the defendant vessel. Even if the said documents are taken into consideration all that it indicates is that plaintiff entered into contract with Barama Company Ltd. That the plaintiff was negotiating with defendant no.2 for finalizing the purchases to be made and that ultimately a letter of credit was opened by defendant no.2 in favour of Barama Company Limited, which sold goods to the plaintiff. There is no indication in relation to the basic claim of the plaintiff that it had executed the fixture note because of the representation made on behalf of the owners of the vessel as regards the speed of the vessel.

49 If the fixture note is read it becomes apparent that despite various particulars of the vessel having been mentioned including the year of manufacture of the vessel, dimensions of the vessel, various capabilities including the capacity of the Engine etc., nowhere does the fixture note specify, nor even state anything as regards the speed of the vessel. Therefore, even if the correspondence leading to the fixture note is read with the fixture note there is no evidence to hold that the plaintiff was led into believing that the vessel would travel at a particular speed so as to ensure the completion of the voyage within a particular period.

50 The next contention on behalf of the plaintiff is that it would be a case of implied warranty/guarantee in terms of the law on charter parties. Suffice it to state that this contention would have been available to the plaintiff provided the fixture note did not contain the following term at the end of the fixture note :

> "This fixture is subject to all other terms, conditions exceptions as per 'CENCON" charter [As Revised 1922, 1976 and 1994]".

The plaintiff has not been able to show that CENCON charter has any such implied warranty. It is not even averred. In fact the defendant vessel in its Civil Application seeking vacating of the order of arrest has referred to Clause (2) pertaining to owners' responsibility and stated that there is no loss or damage to the goods or delay in delivery of goods due to personal want of due diligence on the part of the owners or their Managers etc. To this averment of the defendant vessel, in the Civil Application, the plaintiff in reply affidavit states that "the clause relied upon by the defendant no.1 is an exclusionary clause and is unreasonable and unconscionable. It is not an individually negotiated term. The fixture note is pre formulated and incorporation of the said term is allegedly by reference to 'GENCON Charter'. The plaintiff has indisputably not consciously agreed to incorporation of the said clause". This statement of the plaintiff, to say the least, belies comprehension. The plaintiff does not dispute having entered into the contract by way of fixture note. In fact, the Xerox copy of the fixture note available at page nos. 15 to 20 bear the signature and seal of the plaintiff. Therefore, the say of the plaintiff that it has not consciously agreed to incorporation of the said clause is something which cannot be countenanced. It is a dishonest defence, if it could be termed as a defence.

51. (The Indian) Bills of Lading Act, 1856 (hereinafter referred to as the 'B.L.Act') has been brought on statute book to provide for cases where a bonafide holder of a bill of lading for value is not questioned by the Master of the vessel or other person. The said Act recognises mercantile custom that a bill of lading of goods is transferable by endorsement, and the property in goods in question, in such circumstances passes to endorsee along with rates contracted as contained in the bill of lading. Section 1 of the B.L.Act states that every consignee of goods named in a bill of lading and every endorsee to whom the property in the goods mentioned in such bill of lading shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with such consignee or endorsee. Section 3 of the said Act stipulates that every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel, shall be conclusive evidence

of such shipment as against the master or other person. Applying the aforesaid provisions to the facts of the present case, as already noticed hereinbefore, the bill of lading in question, produced by the plaintiff, does not mention any name or particulars in the column of "CONSIGNEE". The said column only states : "TO ORDER". Thus, on plain reading the said bill of lading (Annexure 'D') shows the shipper to be Barama Company Limited and the notify address is defendant no.2. The plaintiff is thus not able to establish that it was either the consignee or the endorsee of the bill of lading. The contention on behalf of the plaintiff that the transaction as a whole should be considered especially in light of the fact that the plaintiff had entered into transaction of purchase with Barama Company Limited has to be appreciated in light of the fact that the defendant has traversed the stand of the plaintiff as being the owner of the goods in question. The question that arises is as to what is the right, title, interest of the plaintiff in the goods in question. As already seen the title to the goods is primarily based on bill of lading which is a negotiable instrument and the title passes by endorsement. Even if the contention that the transaction was midstream on the date when the suit was presented is considered, it is apparent that the transaction as to title was at midstream between plaintiff and defendant no.2. The defendant vessel was nowhere in picture. When one talks of right, title or interest in a property does the right mean only right to the property or does it include right to sue for the property. Is it possible for both these rights to exist independent of each other; namely, even if a person does not have the right to goods, can such person have right to sue. This right to sue goes along with title to the property or to the goods. Thus, in absence of title to the goods in question the plaintiff cannot claim the right to sue. The contention of the plaintiff is therefore not acceptable.

52 In-fact, there are two different contracts. One is the fixture note : whereunder, the plaintiff entered into a contract of hiring the vessel. The other is the bill of lading : it denotes right over the goods - right to the goods. The plaintiff has failed in establishing that as per the bill of lading it is entitled to goods. There is no endorsement in favour of the plaintiff. There is no agreement evidencing that defendant No.2 will endorse the bill of lading at a future date in favour of plaintiff.

53 It was submitted on behalf of the plaintiff that

if the transaction is examined in context of the provisions of The Sale of Goods Act, 1930 (1930 Act), the plaintiff's right to sue would stand established. Section 2(4) of the 1930 Act defines "document of title to goods" so as to include a bill of lading, ..., either by endorsement or by delivery, ... Section 2(6) defines "future goods" means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale. Section 4(1) of the 1930 Act states that a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another. Sub-section (3) of Section 4 lays down where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. Under Section 4(4) an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. Section 14 states that in a contract of sale, unless the circumstances of the contract are such as to show a different intention there is - (a) an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass. Testing the contention of the plaintiff in light of the aforesaid provisions, as already seen, the bill of lading does not show either the name of the plaintiff or any endorsement in favour of the plaintiff so as to enable the plaintiff to claim "document of title to goods". Even if it could be contended that the goods were "future goods" which were to be acquired by the seller after making of the contract of sale it is necessary to bear in mind that the so called contract based on the proforma invoice at page 34 (Annexure 'F') does not contain the signature of Shri Ambica Timber Depot, the alleged buyer. As can be seen from Provisions of Section 4 of the 1930 Act, the property in the goods has to be transferred from the seller to the buyer so as to complete the contract of sale, which in the present case, by its very nature, cannot be said to be a contract of sale of goods. The next question that would arise is as to whether it should be termed as an agreement to sell where the transfer of the property in the goods is to take place at a future time. If that be so the document (Annexure 'F') is silent in relation to the time within which the agreement

was to be fulfilled so as to complete the contract. Provisions of Section 14 regarding implied undertaking as to title also cannot be resorted to by the plaintiff in absence of document of title to goods. Hence, even on reading the Provisions of the 1930 Act, it is not possible to accept the contention that the plaintiff has incurred a loss or is likely to incur a loss due to delay in the delivery of cargo.

54 Thus, not only is the plaintiff not in a position to establish any prima facie case but it is hopeless case not entitling the plaintiff to any order of arrest. In fact, as already noted hereinbefore, the plaintiff has been categorical in admitting that loss may be incurred either by plaintiff or defendant no.2 (Paragraph 5.5 of the plaint). The suit therefore deserves dismissal on this ground also.

55 Before parting, it is necessary to take note of a disturbing feature which has come to the notice of the Court. On the one hand the plaintiff is trying to make out a case that it is likely to suffer loss of U.S. $ 2,33,000/- and odd, which when converted into Indian rupees would be a few lacs of rupees and yet the plaintiff values the subject matter of the suit for the purpose of court-fees at Rs.300/- only by stating "suit valued at unascertainable". During the course of hearing, the learned Advocates appearing on behalf of the respective parties admitted the position that the court-fees that are charged in other High Courts on such subject matters are at ad valorem. It is therefore necessary that, even in cases where this court has jurisdiction, appropriate court-fees are levied in relation to such subject matters. The State Government, if so advised, may make appropriate amendment in this regard. A copy of this order, for this limited purpose be served on the Secretary, Finance and Revenue as well as Secretary, Legal to do the needful, if so deemed fit.

56 Therefore, O.J.M.C.A.No. 187 of 2003 is allowed. This Court has no jurisdiction to entertain this suit. Even otherwise, on merits the plaintiff has not only not been able to establish a prima facie case but has a hopeless case. As a consequence , Admiralty Suit No. 14 of 2003 is dismissed. The order dated 19.12.2003 directing arrest of the vessel stands vacated forthwith. There shall be no order as to cost.

(D.A.Mehta,J)

57 At this stage Mr.M.J.Thakore, learned Senior

Counsel appearing on behalf of the plaintiff, requests that the order of arrest, which has been operating since 19-12-2003, be continued so as to enable the plaintiff to seek appropriate relief. Mr.R.J.Oza, learned advocate appearing on behalf of defendant No.1, objects to the request. The order of arrest shall continue to operate till 01-03-2004.

(D.A.Mehta, J)

m.m.bhatt